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WATERS AND WATERCOURSES — RIPARIAN RIGHTS IN STREAMS FLOWING THROUGH SEVERAL STATES — A special master appointed by the Court after the filing of a bill by the state of Washington praying an injunction against the state of Oregon found that inhabitants of Oregon had been diverting water from the Walla Walla River, a non-navigable stream, by means of a dam for over fifty years for use in irrigating their lands which would otherwise be arid and had been for a long time pumping some nine thousand acre feet of water per annum from wells bored on their lands. The state of Washington claimed this diversion materially injured an irrigation project known as the Gardenas Farms which had been declared by a Washington decree of 1928 to have a prior appropriation claim on the waters as of 1892 because it had posted notice of intention to divert in that year, but which had not been actually started until 1903 and had laid no claim to the water in question until 1930. The master further found that an injunction against the stream diversion would ruin the Oregon farmers and give the Washington project very little more water because the bed of the river between them would tend to soak up almost the entire flow during the dry season. He also found that there was no satisfactory proof that the pumping from the wells injured the plaintiff materially. The parties stipulated for the application of the doctrine of prior appropriation. The Supreme Court, in an opinion by Mr. Justice Cardozo, dismissed the bill, saying the Washington decree of 1928 as to priority had no effect on persons and states not parties to the proceeding, that prior appropriation was lost by the Gardenas project by laches, and that the plaintiff had not shown serious enough injury in any event to warrant enjoining a private person, much less a state. *Washington v. Oregon*, 297 U. S. 517, 56 S. Ct. 540 (1936).

The common law limited the quantity of stream water usable for irrigation to that reasonable in view of the needs of other riparian proprietors[1] but the doctrine of prior appropriation, followed generally in the West and agreed to by the parties, entitles the first appropriator of the waters of a stream to a right to continue appropriation to the same extent regardless of injury to other riparian owners.[2] The part of the decision relating to the diversion of river

[1] Elliot v. Fitchburg R. R., 10 Cush. (64 Mass.) 191, 57 Am. Dec. 85 (1852); Gillett v. Johnson, 30 Conn. 180 (1861); Ulbricht v. Eufaula Water Co., 86 Ala. 587, 6 So. 78 (1889); Low v. Schaffer, 24 Ore. 239, 33 P. 678 (1893); Lux v. Haghin, 69 Cal. 255, 4 P. 919, 10 P. 325 (1886); Minnesota Loan & Trust Co. v. St. Anthony Falls Water Power Co., 82 Minn. 505, 85 N. W. 520 (1901); Union Mill Co. v. Dangberg, (D. C. Nev. 1873) Fed. Cas. No. 14, 370; Meng v. Coffey, 67 Neb. 500, 93 N. W. 713 (1903).

[2] Tartar v. Spring Creek Water & Mining Co., 5 Cal. 397 (1855); Thorp v. Freed, 1 Mont. 651 (1872); Basey v. Gallagher, 20 Wall. (87 U. S.) 670, 22

water, then, is an interpretation of the doctrine of prior appropriation and is supported fully by cases in both the involved states holding that rights of prior appropriation are lost by laches or lack of good faith and due diligence.[3] Failure to exercise its appropriation for thirty-eight years would seem to be laches on the part of the Gardenas Farms and the contrary 1928 decision in Washington could scarcely have bound Oregon or its citizens.[4] As to taking water from wells on an owner's own land, the early decisions held it not actionable even though for sheer waste or for sale [5] unless the water flowed in a well-defined channel traceable on the surface.[6] The more widespread modern view is that underground percolating waters may not be wasted or sold to the injury of other landowners [7] but their reasonable use on the land of the abstracting proprietor is nowhere actionable.[8] Under either view the Court's decision

L. Ed. 452 (1875); Lobdell v. Simpson, 2 Nev. 274 (1866); WIEL, WATER RIGHTS IN THE WESTERN STATES, 3d ed., parts I, II, III; part IV, c. 40 (1911).

[3] Nevada Ditch Co. v. Bennett, 30 Ore. 59, 91, 45 P. 472 (1896); Seaward v. Pacific Livestock Co., 49 Ore. 157, 88 P. 963 (1907); In re Willow Creek, 74 Ore. 592, 144 P. 505, 146 P. 475 (1915); In re Hood River, 114 Ore. 112, 227 P. 1065 (1925); Low v. Rizor, 25 Ore. 551, 37 P. 82 (1894); In re Silvies River, 115 Ore. 27, 237 P. 322 (1925); State ex rel. Ham v. Superior Court, 70 Wash. 442, 126 P. 945 (1912). And see: Ophir Mining Co. v. Carpenter, 4 Nev. 534 (1869); Sieber v. Frink, 7 Colo. 148, 2 P. 901 (1883); Dyke v. Caldwell, 2 Ariz. 394, 18 P. 276 (1888); Sand Point Water & Light Co. v. Panhandle Development Co., 11 Idaho 405, 83 P. 347 (1906); 1 WIEL, WATER RIGHTS IN THE WESTERN STATES, 3d ed., §§ 371, 567 (1911).

[4] United States v. Oregon, 295 U. S. 1, 55 S. Ct. 610 (1934); Priest v. Las Vegas, 232 U. S. 604, 34 S. Ct. 443 (1913).

[5] Acton v. Blundell, 12 Mees. & W. 324, 152 Eng. Rep. 1223 (1843); Chasemore v. Richards, 7 H. L. Cas. 349 (1859); Wheatley v. Baugh, 25 Pa. 528 (1855).

[6] Black v. Ballymena Commrs., 17 L. R. Ir. 459 (1886); Wheatley v. Baugh, 25 Pa. 528 (1855); Tampa Water Works Co. v. Cline, 37 Fla. 586, 20 So. 780 (1896); Collins v. Chartiers Valley Gas Co., 131 Pa. 143, 18 A. 1012 (1890); Gould v. Eaton, 111 Cal. 639, 44 P. 319 (1896); Barclay v. Abraham, 121 Iowa 619, 96 N. W. 1080 (1903); Hale v. McLea, 53 Cal. 578 (1879); Saddler v. Lee, 66 Ga. 45 (1880); Whetstone v. Bowser, 29 Pa. 60 (1857); Case v. Hoffman, 84 Wis. 438, 54 N. W. 793 (1893); Clinchfield Coal Corp. v. Compton, 148 Va. 437, 139 S. E. 308 (1927); Keeney v. Carillo, 2 N. M. 480 (1883); Willis v. City of Perry, 92 Iowa 297, 60 N. W. 727 (1894); Strait v. Brown, 16 Nev. 317 (1881).

[7] Bassett v. Salisbury Mfg. Co., 43 N. H. 569 (1862); Swett v. Cutts, 50 N. H. 439 (1870); Meeker v. City of East Orange, 77 N. J. L. 623, 74 A. 327 (1909); Katz v. Walkinshaw, 141 Cal. 116, 70 P. 663, 74 P. 766 (1903); Bernard v. City of St. Louis, 220 Mich. 159, 189 N. W. 891 (1922); Forbell v. New York, 164 N. Y. 522, 58 N. E. 644 (1900); Gagnon v. French Lick Springs Hotel Co., 163 Ind. 687, 72 N. E. 849 (1904); Snake Creek Mining & Tunnel Co. v. Midway Irrigation Co., 260 U. S. 596, 43 S. Ct. 215 (1922).

[8] Greenleaf v. Francis, 18 Pick. (35 Mass.) 117 (1836); Wheatley v. Baugh, 25 Pa. 528 (1855); Roath v. Driscoll, 20 Conn. 533 (1850); Bloodgood v. Ayers, 108 N. Y. 400, 15 N. E. 433 (1887); Frazier v. Brown, 12 Ohio St. 294 (1861); Maricopa County District v. Southwest Cotton Co., 39 Ariz. 65, 4 P. (2d) 369 (1931); City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 P. 585 (1899); Snake Creek Mining & Tunnel Co. v. Midway Irrigation Co., 260 U. S. 596, 43 S. Ct.

is correct. The Court followed the rules that action of a state will not be enjoined in the absence of a clear showing of serious injury [9] and that the rights between states in waters will be determined on the basis of fairness and justice rather than strictly according to the principles of the comman law.[10]

W. W. F.

215 (1922); 2 WIEL, WATER RIGHTS IN THE WESTERN STATES, 3d ed., § 1042 (1911).

[9] Wyoming v. Colorado, 259 U. S. 419 at 471, 42 S. Ct. 552 (1921); New York v. New Jersey, 256 U. S. 296 at 309, 41 S. Ct. 492 (1920); North Dakota v. Minnesota, 263 U. S. 365 at 374, 44 S. Ct. 138 (1923); Connecticut v. Massachusetts, 282 U. S. 660 at 669, 51 S. Ct. 286 (1930); Missouri v. Illinois, 200 U. S. 496 at 521, 26 S. Ct. 268 (1905); Kansas v. Colorado, 206 U. S. 46 at 109, 27 S. Ct. 655 (1906).

[10] Connecticut v. Massachusetts, 282 U. S. 660 at 670, 51 S. Ct. 286 (1930); New Jersey v. New York, 283 U. S. 336 at 342, 51 S. Ct. 478 (1931); Missouri v. Illinois, 200 U. S. 496 at 520, 26 S. Ct. 268 (1905); Kansas v. Colorado, 206 U. S. 46 at 98, 117, 27 S. Ct. 655 (1906); Georgia v. Tennessee Copper Co., 206 U. S. 230 at 237, 27 S. Ct. 618 (1906); Wyoming v. Colorado, 259 U. S. 419 at 465, 470, 42 S. Ct. 552 (1921).